

SERVED: February 9, 1995

NTSB Order No. EA-4317

UNITED STATES OF AMERICA  
**NATIONAL TRANSPORTATION SAFETY BOARD**  
WASHINGTON, D.C.

Adopted by the NATIONAL TRANSPORTATION SAFETY BOARD  
at its office in Washington, D.C.  
on the 19th day of January, 1995

DAVID R. HINSON,	)	
Administrator,	)	
Federal Aviation Administration,	)	
	)	
Complainant,	)	
	)	Docket SE-13339 and
v.	)	SE-13340
	)	
THOMAS K. CROASDALE and	)	
JOHN L. BURKE,	)	
Respondents.	)	
	)	

**OPINION AND ORDER**

Respondents have appealed from the oral initial decision of Administrative Law Judge William A. Pope, rendered at the conclusion of an evidentiary hearing on February 2, 1994.<sup>1</sup> The law judge affirmed the orders of the Administrator charging each respondent with violating sections 91.123(b) and 91.13(a) of the

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<sup>1</sup>An excerpt from the hearing transcript containing the initial decision is attached.

Federal Aviation Regulations ("FAR," 14 C.F.R. Part 91),<sup>2</sup> based on their deviation from an air traffic control (ATC) altitude clearance. Sanction against both respondents was waived pursuant to the Aviation Safety Reporting Program (ASRP).<sup>3</sup> For the reasons discussed below, we deny respondents' appeal and affirm the initial decision.<sup>4</sup>

The basic facts of this case are not in dispute. On December 18, 1991, Respondent Croasdale was pilot-in-command (PIC) of Delta Flight 1220, a McDonnell Douglas DC-9, with a destination of Louisville, Kentucky. Respondent Burke was second-in-command (SIC) and operated the controls of the aircraft. According to his written statement, ATC cleared Delta

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<sup>2</sup>These regulations state, in pertinent part:

**§ 91.123 Compliance with ATC clearances and instructions.**

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(b) Except in an emergency, no person may operate an aircraft contrary to an ATC instruction in an area in which air traffic control is exercised.

**§ 91.13 Careless or reckless operation.**

(a) Aircraft operations for the purpose of air navigation. No person may operate an aircraft in a careless or reckless manner so as to endanger the life or property of another.

<sup>3</sup>Under the ASRP, pilots who timely file an incident report with the National Aeronautics and Space Administration (NASA) may avoid any certificate suspension stemming from that incident provided that, among other things, the act was inadvertent.

<sup>4</sup>Respondents filed a brief on appeal, to which the Administrator replied. The Administrator also filed a motion to dismiss the appeal, stating that respondents filed their brief late. In their reply to the motion, respondents produced documentation showing that the Administrator had agreed to an extension and one was, in fact, granted by the NTSB's Office of General Counsel. Consequently, the motion to dismiss is denied.

1220 from flight level (FL) 280 to FL 270 approximately 70 miles south of Louisville.<sup>5</sup> At about FL 273, Respondent Burke noticed two B-52s flying in formation near his aircraft's 12 o'clock position. He believed the B-52s were at or above Flight 1220's altitude. (Ex. A-7.) According to Respondent Croasdale, the B-52s were about 7-8 miles away and maneuvering erratically, in that they were moving both vertically and laterally. (Tr. at 92.)

The B-52s were assigned a block altitude of 5,000 through 26,000 feet.<sup>6</sup> Respondent Croasdale stated that it appeared as if one of the aircraft was going to pass above the DC-9 and one would pass below. The B-52s ultimately did pass by the DC-9, approximately one quarter mile off its left wing, according to respondents. In the controller's opinion, however, the B-52s were never that close to respondents. He noted that ATC's conflict alert alarm sounded when Delta 1220 was at FL 264, and the two B-52s were between Delta 1220's 9 and 10 o'clock position, 5-6 miles away, indicating that a loss of separation was imminent without corrective action. (Tr. at 16.) Soon

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<sup>5</sup>The controller on duty stated that Delta 1220 was handed off to him approximately 140-150 miles south of Louisville. The aircraft was northbound, descending to FL 280. He further testified that two B-52s were at Delta 1220's 2 o'clock position, northeast, approximately 40 miles away, traveling in a westerly direction. (Transcript (Tr.) at 13-14.)

<sup>6</sup>The B-52s, being military aircraft, communicated with ATC on a different frequency than Delta 1220. Respondents therefore could not hear the other communication, so had no warning that traffic was in the area and were unaware of the block altitude assignment.

after, Respondent Burke called ATC to ask the altitude of the B-52s. Realizing Delta 1220 had dropped below its clearance, respondents began to correct the aircraft's altitude. They maintain that, while they could have corrected the altitude deviation more quickly, an abrupt recovery would have alarmed the passengers and, because the fasten-seatbelts sign was off, could have caused injury.

The law judge determined, based on the facts, that 1) the respondents perceived a collision threat; 2) there was no actual collision threat; 3) Delta 1220 descended 600 feet below its assigned altitude and remained below its assigned altitude for approximately 37 seconds while respondents' attention was focused on the B-52s; and 4) no emergency occurred that would have justified respondents' departure from their assigned altitude. Therefore, Respondent Croasdale, as the PIC, and Respondent Burke, as the flying pilot, by allowing themselves to be distracted, negligently failed to observe that Delta 1220 was deviating from its assigned altitude and, as such, failed to comply with the ATC direction to maintain FL 270.

On appeal, respondents argue that the law judge erred by finding they were not justified in deviating from their assigned clearance in a perceived emergency. They further assert that they acted carefully in maneuvering Delta 1220 to avoid a collision. In response, the Administrator points out that neither an emergency nor a loss of separation occurred, and maintains that respondents did not deviate to avoid a perceived

collision threat, but instead inadvertently slipped below their assigned altitude when focusing all their attention on the other aircraft.

Respondents ask the Board to find that they "were faced with an emergency situation that allowed them to take the action of deviating from the clearance." (Respondents' brief at 6.) This argument, however, is inconsistent with their testimony and written statements, in which they both admitted that the altitude deviation was inadvertent and occurred while their attention was fixed on the other aircraft.<sup>7</sup> The undisputed facts of the case reveal that the action respondents took was not to purposely change altitude in order to avoid a potential collision, but to concentrate their attention on the B-52s to the exclusion of their other duties.

As holders of airline transport pilot certificates, respondents were expected to exercise the highest degree of care.

The distraction caused by the two B-52s did not relieve respondents from their critical responsibility to monitor their aircraft's altitude. "[A] pilot's duty to monitor altitude during ascent and descent to insure compliance with an ATC

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<sup>7</sup>At the hearing, Respondent Croasdale stated that "[o]ur evasive action was to do nothing, was to hold course" rather than leveling off at FL 270. (Tr. at 98.) Yet, he later stated that he was not aware that they had deviated from their assigned altitude until they were 250 feet low, thus indicating that the deviation was inadvertent. (Tr. at 101.)

The law judge questioned Respondent Burke, asking "I take it then what you're saying is the dip below your assigned altitude was inadvertent while your attention was distracted?" To which Respondent Burke replied, "Yes, sir, it was." (Tr. at 112-13.)

clearance is fundamental, and certainly among those [duties] most vital to flight safety." Administrator v. McIntosh and Spriggs, NTSB Order No. EA-4174 at 6 (1994). Unanticipated distractions or the performance of tasks previously unforeseen do not per se relieve a pilot of this basic obligation to comply with ATC instructions.<sup>8</sup>

We agree with the law judge's determination that, although respondents perceived a collision threat that might have justified their departure from ATC's instructions, an actual emergency did not exist. An emergency is a situation "of such concern that responsive actions inconsistent with ... the [FARs] are justified." Administrator v. Scott, NTSB Order No. EA-4003 at 4, n.5 (1993).<sup>9</sup> The responsive actions taken by a respondent

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<sup>8</sup>See, e.g., Administrator v. Dillon, NTSB Order No. EA-4132 (1994), where the respondent, as the non-flying PIC, claimed that he was occupied with unforeseeable essential safety-related duties, in that a sudden, unanticipated weather system required him to consult approach plates, which prevented him from monitoring the altimeter. The Board found that this did not excuse him from his obligation to monitor altitude. See also Administrator v. Baughman, NTSB Order No. EA-3563 (1992), where the respondent admitted the altitude deviation, but claimed as affirmative defenses autopilot malfunction and the performance of other duties. The Board upheld the violation of deviating from an ATC clearance, finding that the respondent did not demonstrate the highest degree of care required of a PIC. The respondent's performance of important "see and avoid" functions did not excuse his failure to monitor the altimeter: "the two are not mutually exclusive." Id. at 4.

<sup>9</sup>In Scott, ATC relayed a message to the respondent from the airline's dispatch center directing him to return to the airport. All the respondent knew was that the order had originated with maintenance personnel. The respondent returned and landed the aircraft 30,000 pounds over maximum landing weight. The Board found that he was justified in believing an emergency existed, and refused to question his decision to land over maximum weight rather than take the extra time to dump fuel.

also must be reasonable under the circumstances. Id. For example, in Administrator v. Owen, 3 NTSB 854 (1977), the respondent exceeded his altitude clearance by about 600 feet when, after observing another aircraft closing rapidly on what he perceived as a collision course, he made a sudden right turn. The actual vertical separation of the two aircraft was only about 500 feet. The Board determined that this deviation from altitude clearance was excusable, as the perception that the other aircraft was at the same altitude as respondent's and the decision to initiate evasive action were not unreasonable. In the instant case, however, respondents did not purposely take evasive action. Rather, while in a shallow descent, both the captain and co-pilot, who were concentrating on the traffic that they saw nearby, neglected to monitor the aircraft's altitude. Complying with ATC clearances is an inherent part of a pilot's overall responsibilities. Administrator v. Haines, 1 NTSB 769, 771 (1970).

Therefore, for the reasons stated above, we affirm the law judge's conclusion that respondents violated FAR sections 91.123(b) and 91.13(a) by deviating from ATC instructions.

**ACCORDINGLY, IT IS ORDERED THAT:**

1. Respondents' appeal is denied; and
2. The Administrator's orders and the initial decision are affirmed.

HALL, Chairman, HAMMERSCHMIDT and FRANCIS, Members of the Board, concurred in the above opinion and order.